IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CARLOS TORRES, Appellant.	)	No. 61616-1-I (Consolidated with No. 62282-0-I) DIVISION ONE PUBLISHED IN PART FILED: July 27, 2009

Cox, J. — Carlos Torres, a former Washington State Patrol trooper, appeals his conviction for first degree custodial sexual misconduct. The jury instruction defining "being detained" for purposes of the custodial sexual misconduct statute that Torres challenges correctly states the law. "Being detained" for purposes of the law means "restraint on freedom of movement to such a degree that a reasonable person would not have felt free to leave." Moreover, there is sufficient evidence to support the jury's verdict convicting Torres on the charge. Because we also reject the other arguments he makes on appeal, we affirm.

In the early morning hours of June 17, 2005, former Washington State Patrol Trooper Carlos Torres arrested T.G. for DUI after he stopped her vehicle

near Fife on Interstate 5. Torres handcuffed T.G. and placed her in the back seat of his patrol car. He advised T.G. of her rights and drove her to the Fife Police Station nearby for a blood alcohol content (BAC) test.

T.G. testified at trial that before leaving for the police station Torres told her she reminded him of someone and that he thought she was beautiful. T.G. was flattered and thought Torres was very nice.

At the police station, the BAC machine malfunctioned and Torres then took T.G. to the Puyallup Tribal Police Department. This drive took approximately 15 minutes.

T.G. testified that during this drive Torres kept talking to her about another girl that she reminded him of, someone he had had a relationship with. He then asked her if he could be blunt. When she agreed, he started asking her questions about oral sex.

T.G. was shocked and scared and started to wonder if Torres was really a state trooper. She testified that it was the most awkward she had ever felt and did not know how to act. He then asked T.G. about her own relationships. T.G. testified that she felt compelled to answer: "I was scared, and I was in the back of a cop car with handcuffs on me. The guy has a gun on him and I . . . just felt that I kind of had to go along with it. I was thinking in my mind that if I just answer his questions I can go home, I can go home and be safe."[1] Torres denied having a conversation during the drive.

[1] Report of Proceedings (March 6, 2008) at 647.

When they arrived at the Puyallup station, T.G. provided two breath samples, indicating a blood alcohol level of .055. Torres then transported her to the Pierce County Jail.

On the drive to the jail, Torres again started talking about sex and at one point asked T.G. if she liked oral sex. He also talked about anal sex, his sexual experiences, and the size of his penis. He asked T.G. detailed questions and kept talking about how much he wanted to go see the woman that T.G. reminded him of after his shift. He also asked T.G. whether she had any sexual fantasies and whether women fantasized about having sex with a police officer in a police car.

Because the Pierce County Jail was full, Torres did not book T.G. into the jail. Torres removed the handcuffs from T.G. and released her. He asked where her ride would be coming from to pick her up and T.G. told him Federal Way. Because Torres had to drive north to check the county line, he offered to give T.G. a courtesy ride to the southbound truck scale house to meet her ride. After completing more paperwork related to her release, Torres testified that he let T.G. use his cell phone to call her ride to meet them at the scale house. T.G. testified that she asked Torres if her fiancé could pick her up at the jail, but Torres had her get back into the car and told her he was taking her to Federal Way. T.G. testified that he would not allow her to call her fiancé but that Torres called her fiancé after she gave him the number. T.G. testified that on the drive Torres started talking about sex again. He told her she would be surprised what

can happen in the back of a police car and insinuated that he had previously had sex in the building at the Federal Way scales where they were headed.

At about 3:00 a.m. they arrived at the Federal Way scales and Torres parked his vehicle under a light by the scales building. T.G. testified that she could not open the doors or roll down the windows in the back seat of the car. After parking, Torres then began commenting on T.G.'s appearance, telling her she had a great body and nice breasts. He told her to lift her blouse so he could see her breasts, which she did. He then told her he wanted to see her breasts without her bra. She lifted her bra. He then told her he wanted to put his mouth on her nipples. Torres told her to move forward, closer to the partition between the seats, and he turned toward her and moved onto his knees. He touched her breast with his fingers and also put his head through the divider window and put his mouth on her breast. Afterward, he turned back around into a forward position in the front seat and told her he had an erection. He then asked T.G. if she shaved her pubic area and said he wanted to see it. He told her to unbutton her belt and pants, and she complied. Torres told T.G. that he wanted to touch her, at which point he turned back around on his knees, leaned through the window area, and put his hands inside her pants. He put his hand inside T.G.'s underwear, inserted his finger into her vagina, and touched her clitoris. T.G. testified that a car then came into the weigh station and Torres immediately stopped touching her and turned back around in the front seat. After the car left, Torres told her that he had an erection and needed to "relieve himself."

He asked T.G. to go into the building with him, explaining that he could not leave her alone in the car. Because T.G. refused to go into the building, Torres opened the back car door, let T.G. out, and instructed her to stand next to the car while he went into the building. After he returned, it was only a few minutes before T.G.'s ride arrived about 3:30 a.m.

T.G. testified that as soon as she got into the car with her fiancé and daughter that she starting crying and yelling to "get me out of here." Her fiancé could tell something was wrong, but all T.G. told him at that point was that Torres was hitting on her and there was inappropriate conversation.

Over the next few days, T.G. told her fiancé and her brother and his wife about the incident with Torres. T.G.'s sister-in-law reported the incident to the Washington State Patrol. At trial, T.G.'s daughter, fiancé, brother, and sister-in-law testified about T.G.'s emotional state and behavior following the incident.

The State charged Torres with first degree sexual misconduct under RCW 9A.44.160(1)(b). A jury convicted him as charged. Torres appeals.

JURY INSTRUCTION

Torres primarily argues that the trial court's jury instruction defining the level of restraint needed for custodial sexual misconduct incorrectly states the law. Specifically, he claims that the term "being detained" as stated by the statute means "restraint pursuant to a lawful arrest." [2] We disagree. We hold that "being detained" for purposes of the law means "restraint on freedom of

[2] Brief of Appellant at 23.

movement to such a degree that a reasonable person would not have felt free to leave."

There is neither a WPIC nor a reported case that addresses what the proper law is for purposes of the charge in this case. Accordingly, this is a case of first impression.

"Jury instructions are sufficient if they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied. . . . [A]n instruction's erroneous statement of the applicable law is reversible error where it prejudices a party."[3]

We review a challenged jury instruction de novo, in the context of the instructions as a whole.[4]

For purposes of determining the correct statement of the law for an instruction, our fundamental objective in reading the relevant statute is to ascertain and carry out the legislature's intent.[5] A court should not adopt an interpretation that renders any portion meaningless.[6] We interpret statutes in a manner that best advances the legislative purpose.[7] Strained meanings and

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[3] Hue v. Farmboy Spray Co., Inc., 127 Wn.2d 67, 92, 896 P.2d 682 (1995).

[4] State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007).

[5] See Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9, 43 P.3d 4 (2002).

[6] State v. Keller, 143 Wn.2d 267, 277, 19 P.3d 1030 (2001).

[7] Bennett v. Hardy, 113 Wn.2d 912, 928, 784 P.2d 1258 (1990).

absurd results should be avoided.[8]

"When a statute fails to define a term, the term is presumed to have its common law meaning and the Legislature is presumed to know the prior judicial use of the term."[9] The legislature is presumed to know the law in the area in which it is legislating, and statutes will not be construed in derogation of common law absent express legislative intent to change the law.[10]

The meaning of a statute is a question of law that we review de novo.[11]

Here, the State charged Torres under the first degree custodial sexual misconduct statute, RCW 9A.44.160, which provides in relevant part:

> (1) A person is guilty of custodial sexual misconduct in the first degree when the person has sexual intercourse with another person:
> . . . .
>
> (b) ***When the victim is being detained,*** *under arrest[,] or in the custody of a law enforcement officer* and the perpetrator is a law enforcement officer.
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> (2) Consent of the victim is not a defense to a prosecution under this section.[12]

The most natural and straightforward reading of this statute suggests two points. First, the legislature intended that this criminal statute would apply to

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[8] State v. Neher, 112 Wn.2d 347, 351, 771 P.2d 330 (1989).

[9] State v. McKinley, 84 Wn. App. 677, 684, 929 P.2d 1145 (1997).

[10] Wynn v. Earin, 163 Wn.2d 361, 371, 181 P.3d 806 (2008).

[11] Okeson v. City of Seattle, 150 Wn.2d 540, 548-49, 78 P.3d 1279 (2003).

[12] (Emphasis added.)

different types or levels of restraint of a victim. Second, consent of the victim, regardless of the level of restraint, would not be a defense to prosecution. Under the circumstances of this case, the trial court gave the following instruction:

> "Being detained by" or "in the custody of a law enforcement officer" means restraint on freedom of movement to such a degree that a reasonable person would not have felt free to leave.[13]

The portion of the statute that includes "under arrest" was not at issue in this case. Torres does not claim any error based on the omission of any reference to that portion of the statute in the jury instruction. Likewise, Torres does not argue that the inclusion of a reference to "custody" in this instruction was erroneous. Our focus, therefore, is on the phrase "being detained," a phrase the statute does not define.

In 1997, two years before the legislature enacted this statute, our supreme court discussed the legal meaning of the words "detention" and "seizure" in State v. Armenta.[14] There, the court addressed whether two men were detained by a police officer in violation of their Fourth Amendment rights.[15] Although that case focused on whether the detention was proper, it also discussed the legal definition of a detention (also called a seizure), which is helpful to our analysis here.

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[13] Clerk's Papers at 69 (Instruction 9).

[14] 134 Wn.2d 1, 948 P.2d 1280 (1997).

[15] Id. at 4.

The Armenta court recognized that "[n]ot every encounter between an officer and an individual amounts to a seizure."[16] Rather, "[a] person is 'seized' [or detained] under the Fourth Amendment only if, 'in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'"[17] "'Whether a reasonable person would believe he was detained depends on the particular, objective facts surrounding the encounter.'"[18]

Presumably, at the time that the legislature adopted the custodial sexual misconduct statute, the legislature was aware of the common law definition of "detention" discussed in Armenta. Consequently, we may presume that the legislature intended that the common law definition of "detention" should apply since the legislature did not expressly define the word in the statute. We therefore conclude that the trial court's use of the common law definition of "detained" in the jury instruction defining custodial sexual misconduct in this case was correct.

Torres argues that the term "being detained" should be interpreted to

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[16] Id. at 10.

[17] Id. at 10 (quoting United States v. Mendenhall, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877, 64 L. Ed. 2d 497 (1980), quoted in State v. Aranguren, 42 Wn. App. 452, 455, 711 P.2d 1096 (1985); accord Florida v. Bostick, 501 U.S. 429, 439, 111 S. Ct. 2382, 2388, 115 L. Ed. 2d 389 (1991) (question is "whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter").

[18] Armenta, 134 Wn.2d at 11 (quoting State v. Ellwood, 52 Wn. App. 70, 73, 757 P.2d 547 (1988) (citing Mendenhall, 446 U.S. at 554)).

mean "in custody." His argument is not persuasive.

The plain words of the statute make clear that "being detained" is different from either "under arrest" or "in the custody of" for purposes of the statute. To argue that "detained" means "custody" in this context would read "custody" out of the statute. This is a result that we avoid in construing a statute.[19]

Torres cites to several cases, arguing that they inform our construction of this statute. The cases deal with questions regarding custodial interrogation, consent to a search, or agreement to take a field sobriety test.[20] They are inapposite. The question here is what "being detained" means under this statute, not whether the circumstances here were so coercive as to render consent involuntary. As we have already noted, the first degree custodial sexual misconduct statute specifically makes the victim's consent irrelevant to the crime.[21]

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[19] See Keller, 143 Wn.2d at 277 (statutes must be construed to give all language effect with no portion rendered meaningless or superfluous).

[20] Bostick, 501 U.S. 439 (holding consent to a search involuntary where "a reasonable person would [not] feel free to decline the officers' requests or otherwise terminate the encounter"); Berkemer v. McCarty, 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984) (holding that a traffic stop does not trigger the need for Miranda warnings); Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) (requiring Sixth Amendment warnings to protect from coercive pressures of custodial interrogation); State v. Lorenz, 152 Wn.2d 22, 36-37, 93 P.3d 133 (2004) (adopting Berkemer standard regarding custodial interrogations in Washington); Heinemann v. Whitman County, 105 Wn.2d 796, 718 P.2d 789 (1986) (concluding that requesting field sobriety tests during a traffic stop does not subject a suspect to the coercive restraints associated with formal arrest and Miranda warnings are not required).

[21] RCW 9A.44.160(2).

Torres next argues that legislative history supports his argument that "detained by" should be interpreted to mean "in custody." He is wrong.

Although legislative history is not a necessary aid to construe this statute, we note that the legislative history of this statute does not support Torres's argument.[22] Both the Senate Bill Report and House Bill Analysis state that the law would protect "[v]ictims who are detained, under arrest, or in the custody of law enforcement . . . ."[23] This suggests that the legislature contemplated criminalizing three distinct levels of control by correctional and law enforcement officers. While the legislature may have been focused on criminalizing sexual relations between correctional officers and inmates, the reports make it clear that the statute was intended to protect a broader range of victims.[24]

Significantly, neither report indicates that the legislature intended to criminalize only the activity of correctional or law enforcement officers where a victim was in custody for purposes of Miranda.[25] The Senate Bill Report

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[22] See City of Olympia v. Drebick, 156 Wn.2d 289, 295, 126 P.3d 802 (2006) (Only when the plain, unambiguous meaning cannot be derived through such an inquiry will it be "appropriate [for a reviewing court] to resort to aids to construction, including legislative history.") (citing Campbell & Gwinn, 146 Wn.2d at 12).

[23] Senate Comm. On Judiciary, S.B. Rep. on Substitute S.B. 5234, at 1, 56th Leg., Reg. Sess. (Wash. 1999); House Committee on Criminal Justice and Corrections, H.B. Analysis on Substitute S.B. 5234, at 1, 56th Leg., Reg. Sess. (Wash. 1999).

[24] Senate Comm. On Judiciary, S.B. Rep. on Substitute S.B. 5234, at 1, 56th Leg., Reg. Sess. (Wash. 1999).

[25] See Miranda, 384 U.S. 436 (requiring Sixth Amendment warnings to protect from coercive pressures of custodial interrogation).

includes the statement "This bill covers law enforcement in an arrest situation."[26] But contrary to Torres's argument, this statement appears to be a description of testimony given in favor of the bill, not a description of the scope of the proposed statute.[27] Finally, we do not agree with Torres's argument that the word "custodial" used in the title of the crime is dispositive here. The specific statutory language at issue is not confined to the title of the crime.

We affirm the judgment and sentence.

The remaining issues in this opinion are not of precedential importance. Accordingly, the remainder of this opinion is not published.[28]

SUFFICIENCY OF EVIDENCE

Torres argues that there was insufficient evidence to convict him. We disagree.

First, this argument is incorrect because it is based on the faulty assumption that "being detained" is equivalent to "under arrest" or "in the custody of" for purposes of the statute. As we have explained, it is not.

Second, the evidence is sufficient to support Torres's conviction under the proper interpretation of the statute that we previously discussed in this opinion.

Evidence is sufficient to support a conviction if, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found

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[26] Senate Comm. On Judiciary, S.B. Rep. on Substitute S.B. 5234, at 2, 56th Leg., Reg. Sess. (Wash. 1999).

[27] See id.

[28] See RCW 2.06.040.

the essential elements of the crime beyond a reasonable doubt.[29]

Here, the jury heard T.G.'s testimony of the incident, including how Torres engaged her in highly sexualized conversation and instructed her to allow him to touch her breasts and genitals. The jury also considered the circumstances of the incident. For example, the evidence showed that Torres's parked his car at a deserted truck scales on I-5, that T.G. could not leave the vehicle without assistance from Torres, and that Torres carried a side arm and had a shotgun in the front seat. Based on this evidence, a reasonable jury could have concluded that a reasonable person in T.G.'s position would have believed she was not free to leave Torres's patrol car.

To summarize, "being detained" for purposes of the custodial sexual misconduct statute means "restraint on freedom of movement to such a degree that a reasonable person would not have felt free to leave." Neither the "under arrest" nor the "in the custody of" portions of this statute are at issue in this appeal. Consequently, we express no opinion as to how they should be read.

EVIDENTIARY RULING

Torres contends the trial court improperly admitted 404(b) evidence. We conclude that there was no error in admitting the testimony of witnesses S.G. and M.S. as evidence of Torres's overarching plan.

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[29] State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (citing Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) abrogated on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

Evidence of other crimes, wrongs, or acts is not admissible to prove that a defendant has a criminal propensity.[30] However, such evidence may be admissible for other purposes, such as proof of a plan.[31] This exception to the general rule allows proof that the defendant "committed markedly similar acts of misconduct against similar victims under similar circumstances."[32] To establish a common design or plan, the evidence of prior conduct "must demonstrate not merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations."[33] Evidence need not be conclusive but only allow a rational trier of fact to find that the plan existed.[34]

Before admitting such evidence, the trial court must (1) determine that the acts occurred by a preponderance of the evidence, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of the evidence against its prejudicial effect.[35]

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[30] ER 404(b); State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

[31] ER 404(b).

[32] State v. Lough, 125 Wn.2d 847, 852, 889 P.2d 487 (1995).

[33] Id. at 860.

[34] See id. at 861 (affirming where the evidence offered to prove a common scheme or plan could lead a rational trier of fact to conclude the defendant had an overarching plan).

[35] Id. at 852.

A trial court's failure to conduct this analysis on the record is error, however, it is not necessarily reversible error.[36] Where the trial court has not made a record for admission of ER 404(b) evidence, if the record is adequate, the reviewing court must determine whether the evidence was properly admissible for any reason, whether the evidence was relevant for that purpose, and whether the probative value of the evidence outweighed its potential for prejudice.[37] Evidentiary errors under ER 404(b) are harmless unless the error, within reasonable probabilities, affected the outcome of the trial.[38]

Decisions as to the admissibility of evidence are within the discretion of the trial court, and are reversible only for abuse of that discretion.[39] We may affirm on any basis supported by the record.[40]

Here, the court admitted testimony from two of the four women offered by the State, but the judge did not make his ruling on the record, despite the State's request that the court do so. Notably, the record shows that the court carefully considered admissibility -- the parties briefed and argued the motion to exclude,

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[36] See Brundridge v. Fluor Federal Services, Inc., 164 Wn.2d 432, 191 P.3d 879 (2008) (affirming after conducting its own inquiry into the admissibility of the evidence where trial court failed to make a record for admitting evidence under 404(b)); State v. Jackson, 102 Wn.2d 689, 689 P.2d 76 (1984) (reversing after conducting an independent inquiry into whether evidence was admissible for any proper purpose and relevant where the trial court failed to make a record for admitting evidence under ER 404(b)).

[37] Brundridge, 164 Wn.2d at 445-46; Jackson, 102 Wn.2d at 694-95.

[38] Jackson, 102 Wn.2d at 695.

[39] State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

[40] LaMon v. Butler, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989).

and the judge indicated that he intended to spend several hours working through the analysis before ruling. While it was error to fail to make a record of the ruling, this error does not require reversal because the record is adequate for this court to conduct its own inquiry.

As an initial matter, Torres does not dispute that the testimony of S.G. and M.S. meets the preponderance standard.

Proper Purpose

The record is adequate to infer that the trial court admitted the testimony of S.G. and M.S. as evidence of Torres's overarching plan – a proper purpose under ER 404(b). The trial court gave a 404(b) limiting instruction indicating this at the time each woman testified and again in the written instructions to the jury.

Torres arrested S.G. and M.S. for DUI in on May 22 and 23, 2005, respectively. Both women testified that after Torres arrested them, he engaged in sexual talk while they were in his patrol car. Furthermore, M.S. testified that her interactions with Torres led her to have sex with him several days after her arrest.

S.G. testified that after Torres arrested her for DUI and she was alone with Torres in his patrol car, he began talking to her about oral sex. When S.G. replied that she just wanted to go home, the inappropriate conversation ended.

M.S. testified that after Torres arrested her for DUI, he placed her in handcuffs in the back seat of his patrol vehicle and began asking her questions about whether she was involved with anyone. M.S. became upset, apparently

realizing that her DUI arrest would likely jeopardize her job. When M.S. asked Torres whether he was going to arrest her or take her to jail, Torres told her no, but that he was going to take her to get a BAC test. Torres also told her, "This will be our secret," which M.S. took to mean that the charge "was going to be brushed under the carpet" by Torres.

After the BAC test, Torres took M.S. home and gave her his e-mail address. M.S. testified she was left with the feeling he was interested in her romantically. A few days later M.S. and Torres met at the gym. M.S. told Torres she was worried about losing her job and asked if she had anything to be concerned about. He responded, "Don't worry about anything, go out and enjoy your life." Torres also talked to M.S. about his extra marital affairs, pornography, and sex. Later that day, Torres came to M.S.'s home where they had sex. Several days later, M.S. received notice that she had been charged with DUI. After that, she had no further contact with Torres.

Based on the marked similarity of Torres's sexualized words and actions with S.G., M.S., and T.G. under similar circumstances, this evidence was admissible to show Torres's common scheme or plan. He used his position of authority to initiate contact with women who were under scrutiny for DUI and whose judgment was potentially impaired. He sexualized the encounters in a way that was difficult, if not impossible, for the women to prevent — while they were in the back of his patrol car he initiated sexual conversations and spoke about similar subjects with two of the women. That he did not have an explicit

sexual conversation with M.S. the night of her arrest is not significant. His words and conduct toward all three women while in his custody likely caused each of the women to think he wanted to engage in sexual contact. He also used his position of authority to subtly coerce cooperation. Underlying these interactions was the fact that Torres was in a position of power – physically and legally – over the women.

Although not all of the encounters culminated in a sexual encounter, S.G.'s and M.S.'s testimony presented compelling evidence of Torres's plan to seduce, or attempt to seduce, female detainees. While their testimony may not have been conclusive evidence of Torres's plan to use his position of authority for his personal sexual advantage, the jury could have found it was evidence of such a plan.

Relying on State v. DeVincentis,[41] Torres argues that S.G.'s and M.S.'s testimony does not contain the "marked similarities" required to prove a common scheme or plan. Certainly there is not a similarity in result between these women and T.G. – neither of S.G.'s or M.S.'s encounters with Torres resulted in custodial sexual misconduct charges. However, Torres's words and acts with all three women had common features that are best explained by such a plan as already discussed. This is all that DeVincentis requires.

Also contrary to Torres's contention, the court's instructions to the jury make clear that this evidence was not admitted as evidence of Torres's bad

[41] 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

character.

Relevance

The similarity between Torres's interactions with S.G. and M.S. and his interactions with T.G. makes this testimony highly probative and relevant to the charges here. Here, T.G.'s allegations were not supported by any physical or forensic evidence or other eyewitnesses, making her credibility important. Because of its similarities, this evidence made it more likely that T.G.'s allegations were true. As such, the proffered evidence of Torres's plan was relevant to prove the crime charged.

Balancing of Probative Value with Prejudicial Effects

The testimony of S.G. and M.S. had significant probative value such that it outweighed any prejudicial impact of the evidence. Moreover, any potential prejudice was mitigated by the trial court's limiting instruction given at the time S.G. and M.S. each testified and again prior to the jury's deliberations. Because this jury presumably followed the trial court's instruction, Torres cannot show that unfair prejudice is a valid ground for excluding the evidence.[42]

MOTION TO VACATE JUDGMENT

Torres argues that he is entitled to a new trial based on newly discovered evidence and violations of his constitutional rights of due process and

[42] See State v. Johnson, 124 Wn.2d 57, 77, 873 P.2d 514 (1994) (the jury is presumed to follow the court's instruction).

confrontation of witnesses. Accordingly, he contends that the trial court erred in denying his motion to vacate his conviction. We disagree.

The Criminal Rules for Superior Court permit a court to relieve a party from a final judgment under certain circumstances. CrR 7.8 states in relevant part:

> On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons:
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> (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5;
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> . . . .
>
> (5) Any other reason justifying relief from the operation of the judgment. [43]

"To obtain a new trial based upon newly discovered evidence, a defendant must prove that the evidence: (1) will probably change the result of the trial; (2) was discovered after the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; ***and (5) is not merely cumulative or impeaching***."[44] A new trial may be denied if any one of the factors is absent.[45]

We review a trial court's denial of a motion to vacate judgment for abuse of discretion.[46]

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[43] CrR 7.8(b)(2), (5).

[44] State v. Macon, 128 Wn.2d 784, 800, 911 P.2d 1004 (1996).

[45] Id.

[46] Martin v. Pickering, 85 Wn.2d 241, 245, 533 P.2d 380 (1975).

At trial, Torres advanced the theory that T.G.'s allegations were financially motivated. T.G. testified that she had hired an attorney after reporting the incident and acknowledged that in pretrial interviews she had refused to disclose whether she intended to file a civil claim against the Washington State Patrol or Torres. But T.G. also testified that she had not commenced a lawsuit and had no plans to do so.

Following trial, T.G. filed a claim against the Washington State Patrol. On this basis, Torres moved the court to vacate his judgment, arguing the newly filed lawsuit showed that T.G. perjured herself. He sought an in camera hearing to determine whether there was evidence showing T.G.'s intent to cover up her financial motive at trial.

The same judge who presided over the trial denied Torres's motion for a new trial, finding the proffered evidence "would not change the result of the Trial [sic], is not material, and is merely impeaching."[47]

Impeachment evidence is not "merely impeaching" but critical and may warrant a new trial if it "devastates a witness's uncorroborated testimony establishing an element of the offense."[48]

Because Torres's proffered evidence would not have contradicted any of

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[47] Clerk's Papers at 157.

[48] State v. Savaria, 82 Wn. App. 832, 837-38, 919 P.2d 1263 (1996); see also State v. Roche, 114 Wn. App. 424, 437, 59 P.3d 682 (2002) (granting a new trial where new evidence of malfeasance by the crime lab technician "totally devastated" the credibility of the technician's testimony regarding his testing of the alleged controlled substance and proper preservation of the chain of custody of the evidence).

T.G.'s factual allegations, the court properly found it to be "merely impeaching" and properly denied the motion.[49] Moreover, the State put forth considerable evidence corroborating T.G.'s allegations. Several witnesses testified that T.G. told them about the incident shortly after it occurred. They also described T.G.'s behavior and subsequent actions, including her breakdown after being released by Torres and her unwillingness to report what had happened.

Torres argues the denial of his motion violated his Sixth Amendment right to confront and cross-examine T.G. But nothing prevented Torres from fully exploring T.G.'s motives during cross-examination. That T.G. allegedly did not provide truthful answers does not diminish the fact that Torres had opportunity to question T.G. about her alleged bias and thereby suggest that her answers were not truthful. Similarly, nothing precluded Torres from exploring whether T.G. contemplated a lawsuit against him or the Washington State Patrol. And the record shows that Torres indeed cross-examined T.G. on this topic. The cases Torres cites are inapposite.[50] The court's denial of his motion did not violate his constitutional right to confront witnesses.

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[49] See Macon, 128 Wn.2d at 800 (denial of a new trial is proper if any one of the factors is absent).

[50] See Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974) (holding that constitutional right to cross-examine witnesses was violated where defendant was prohibited from inquiring into a witness's probation status because of a statute preventing admission of juvenile court adjudication orders in adult court); State v. Whyde, 30 Wn. App. 162, 632 P.2d 913 (1981) (holding that court ruling, which precluded defendant from cross-examining the complaining witness regarding whether she intended to commence a civil action for damages, violated constitutional right to confront witnesses).

Torres next argues that the State presented false testimony by T.G. At trial, she denied intent to file a claim, but she did so after trial. It was for the jury to decide whether T. G. was credible on this point. Moreover, the prosecutor's closing argument that T.G. did not intend to file a lawsuit was not improper because the prosecutor argued evidence in the record. Accordingly, there was no violation of due process here.

We affirm the judgment and sentence.

Cox, J.

WE CONCUR:

Mann, J.

Grosse, J.